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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

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## Texas Business Group Says Alcohol Regulator Discriminates

By **Michelle Casady**

Law360, Houston (June 27, 2016, 3:07 PM ET) -- The Texas Association of Business filed suit in federal court on Monday claiming the Texas Alcoholic Beverage Commission is in violation of its own standards governing the sale, manufacturing and distribution of alcohol, and has been selectively enforcing the rules for years.

The association, joined by McLane Beverage Distribution, sued in the U.S. District Court for the Western District of Texas, arguing that the commission has arbitrarily applied its Texas Alcoholic Beverage Code in a manner to favor existing permit holders and discriminate against those seeking to enter the market for the first time.

The commission regulates the alcoholic beverage industry via a three-tier system where participants are classified as either manufacturers, distributors or retailers. Each tier must operate independently, and participants in one tier are prohibited from "controlling or influencing" businesses in the other tiers. The association argued in its complaint that the commission has taken that system "to an absurd and unlawful extreme," by holding that even owning one share of stock in a company from another tier is prohibited.

The complaint alleges that because McLane is wholly owned by Berkshire Hathaway, which owns about 2 percent stock in Wal-Mart, the so-called One Share Rule has doomed its permit application. Wal-Mart is an alcohol retailer and if McLane were granted a permit it would be a wholesaler, thus the commission determined granting McLane's application would put Berkshire Hathaway in violation of the rule.

The Texas Association of Business told the court Monday that while the commission protested McLane's application for a permit in 2012, the state agency has conversely approved in the last year more than 2,500 permits for 40 manufacturers, retailers or distributors that have overlapping ownership interests in violation of the one share rule.

"The [Texas Alcoholic Beverage Commission] is engaged in a blatant policy of selective licensing, favoring incumbents that demonstrably violate the One Share Rule, while rejecting new entrants under that same rule," reads the complaint that later refers to the rule as both absurd and irrational. "The TABC has offered no rationale to support its selective licensing practice, and none is apparent, other than naked economic protectionism. The conclusion is unavoidable: the TABC wants to pick 'winners' and 'losers' in the Texas market for alcoholic beverages.... If consistently and faithfully applied to all licensees, the One Share Rule would result in a state of de facto prohibition in Texas."

The Texas Association of Business told the court that by the commission's interpretation of the rule, every employee of the agency is in violation of the one share rule — as are many state and federal employees — via their retirement investments in mutual and pension funds. The Texas Employees Retirement System presently holds over \$1 billion in cross-tier investments, according to the complaint.

According to the complaint, Texas-based McLane operates 80 distribution centers across the U.S. It first sought a wholesaler's permit and a private carrier's permit from the commission in March

2011. The wholesaler permit would allow it to purchase and import liquor for sale to in-state retailers. The private carrier's permit would allow it to transport the liquor for sale.

In August 2012, the commission notified the company that it would be protesting its application in light of the one share rule and subsequently in November McLane withdrew its application.

The Texas Association of Business wrote in its complaint that the commission has renewed a license to one of McLane's main competitors, Core-Mark Holding Co., even though two of the largest investors in that company hold more shares of Wal-Mart stock than Berkshire Hathaway does.

In May, McLane submitted a protest of that renewal to the commission, just as it had in February when protesting the renewal of four permits held by World Market. After meetings with the agency regarding the application of the rule, "TABC refused to indicate what, if anything, it intended to do with respect to the protest."

Counsel information for the commission wasn't available Monday. The parties did not immediately respond to a request for comment.

Texas Association of Business and McLane are represented by Steven Chase Callahan, Brett Charhon and Anthony M. Garza of Charhon Callahan Robson & Garza, PLLC and James C. Ho, Kyle Hawkins and Benjamin D. Wilson of Gibson Dunn & Crutcher LLP.

The case is Texas Association of Business, McLane Company Inc and McLane Beverage Distribution Inc., v. Texas Alcoholic Beverage Commission et al., case number 1:16-cv-00789, in the U.S. District Court for the Western District of Texas, Austin Division.

--Editing by Emily Kokoll.

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